



LE REGISTRAIRE DES MARQUES DE COMMERCE
THE REGISTRAR OF TRADEMARKS

Citation: 2022 TMOB 027

Date of Decision: 2022-02-18

IN THE MATTER OF A SECTION 45 PROCEEDING

Norton Rose Fulbright Canada LLP

Requesting Party

and

Ryan Wiebe

Registered Owner

TMA815,951 for REDLINE

Registration

INTRODUCTION

[1] This is a decision involving a summary expungement proceeding under section 45 of the *Trademarks Act*, RSC 1985, c T-13 (the Act) with respect to registration No. TMA815951 for the trademark REDLINE (the Mark), currently owned by Ryan Wiebe.

[2] All references are to the Act as amended June 17, 2019, unless otherwise noted.

[3] The Mark is registered for use in association with the following:

- (a) motorcyclist protective clothing, motorcycle helmets, and parts for motorcycles, all terrain vehicles, scooters, snowmobiles and personal watercraft (“the Goods”); and

- (b) sales of new and used motorcycles, all terrain vehicles, scooters, snowmobiles and personal watercraft; retail sales of new and used motorcyclist protective clothing, motorcycle helmets, and parts for motorcycles, all terrain vehicles, scooters, snowmobiles and personal watercraft; mechanical repair, service and maintenance of motorcycles, all terrain vehicles, scooters, snowmobiles and personal watercraft (“the Services”).

THE PROCEEDINGS

[4] At the request of Norton Rose Fulbright Canada LLP (the Requesting Party), the Registrar of Trademarks issued a notice under section 45 of the Act on June 8, 2020, to Ryan Wiebe (the Owner), the registered owner of the Mark.

[5] The notice required the Owner to show whether the trademark was used in Canada in association with each of the goods and services specified in the registration at any time within the three-year period immediately preceding the date of the notice and, if not, the date when it was last in use and the reason for the absence of such use since that date. In this case, the relevant period for showing use is June 8, 2017 to June 8, 2020 (the Relevant Period).

[6] The relevant definitions of use are set out in section 4 of the Act as follows:

4(1) A trademark is deemed to be used in association with goods if, at the time of the transfer of the property in or possession of the goods, in the normal course of trade, it is marked on the goods themselves or on the packages in which they are distributed or it is in any other manner so associated with the goods that notice of the association is then given to the person to whom the property or possession is transferred.

4(2) A trademark is deemed to be used in association with services if it is used or displayed in the performance or advertising of those services.

[7] It is well established that bare statements that a trademark is in use are not sufficient to demonstrate use in the context of section 45 proceedings [*Plough (Canada) Ltd v Aerosol Fillers Inc* (1980), 53 CPR (2d) 62 (FCA)]. Although the threshold for establishing use in these proceedings is low [*Woods Canada Ltd v Lang Michener* (1996), 71 CPR (3d) 477 (FCTD)], and evidentiary overkill is not required [*Union Electric Supply Co Ltd v Canada (Registrar of Trade Marks)* (1982), 63 CPR (2d) 56 (FCTD)], sufficient facts must still be provided to permit the

Registrar to arrive at a conclusion of use of the trademark in association with each of the goods and services specified in the registration during the relevant period [*John Labatt Ltd v Rainier Brewing Co* (1984), 80 CPR (2d) 228 (FCA)].

[8] In the absence of use, pursuant to section 45(3) of the Act, the registration is liable to be expunged, unless the absence of use is due to special circumstances.

[9] In response to the Registrar's notice, the Owner furnished a statutory declaration of Ryan Wiebe, declared on August 12, 2020, to which were attached photographs marked as Attachments A – D. The Requesting Party objected to the photographs on the basis that they were “effectively illegible” due to poor printing quality. By letter dated September 17, 2020, the Registrar of Trademarks requested that the Owner provide a clear and legible copy of the statutory declaration within one month. On October 5, 2020, the Owner filed clearer versions of the photographs which the Registrar placed on file. As well, the Owner referenced “active online media” and provided additional material in the form of links to various web pages. The Registrar, in a letter of October 20, 2020, ruled that the additional web links would not be considered as evidence in the proceeding as the links were provided after the deadline for submitting evidence. They are therefore being disregarded.

[10] Only the Requesting Party submitted written representations. No oral hearing was held.

THE EVIDENCE

[11] The following is set out by Mr. Wiebe in his statutory declaration:

- (a) The trademark REDLINE “is under continuous use in respect to each good and service specified in the Registration Number TMA815,951” (para 1);
- (b) Attachment A is a “Photo of Trademark on company signage within the business using Goods pertaining to motorcycles protective clothing, Motorcycle helmets, Parts for Motorcycles, All Terrain Vehicles, Scooters, Snowmobiles and Personal Watercraft” (para 2);

- (c) Attachment B is a “Photo of Service (1) Sales of new and used Motorcycles, All Terrain Vehicles, Scooters, Snowmobiles and Personal Watercraft” (para 3);
- (d) Attachment C is a “Photo of Service (2) Retail sales of new and used Motorcyclist protective clothing, Motorcycle helmets, Parts of Motorcycles,, All Terrain Vehicles, Scooters, Snowmobiles and Personal Watercraft” (para 4);
- (e) Attachment D is a “Photo of Service (3) Mechanical repair, service and maintenance of Motorcycles, All Terrain Vehicles, Scooters, Snowmobiles and Personal Watercraft” (para 5).

[12] The only place where the trademark REDLINE appears in the evidence is on outdoor signage as part of the name Redline Cycle and there is no indication as to how long such signage has been in place or if it was in place at all during the Relevant Period.

ANALYSIS AND REASONS FOR DECISION

[13] As a preliminary matter, I note that the web links provided by the Owner on October 5, 2020, were provided after the deadline for submitting evidence. Accordingly, these web links will be disregarded [*Ridout & Maybee LLP v Encore Marketing International Inc* (2009), 72 CPR (4th) 204 (TMOB)].

[14] The Requesting Party submits that:

- There are deficiencies in the evidence filed such that one cannot conclude that the Owner has shown use of the Mark in Canada during the Relevant Period;
- While Mr. Wiebe asserts that the Mark “is under continuous use”, there is no indication that any such use is by the Owner, occurred during the Relevant Period or took place in Canada (para 7, Requesting Party Written Argument);
- There is no evidence of the Owner’s normal course of trade (para 8, Requesting Party Written Argument);

- There is no evidence of any sales associated with the products depicted in the Owner’s evidence (para 9, Requesting Party Written Argument);
- There is no evidence that the Owner operates the premises or retails the products depicted in Attachment C to Mr. Wiebe’s declaration (para 10, Requesting Party Written Argument);
- The Attachment C depiction does not appear to include any motorcyclist protective clothing and parts for motorcycles, all-terrain vehicles, scooters, snowmobiles or personal watercraft (para 10, Requesting Party Written Argument);
- Attachment D appears to show an indoor repair area showing one motorcycle but there is no discernable use of the Mark in this attachment. In particular, there is no attestation as to the relationship between the premises depicted in Attachment D and the building signage depicted in Attachment A, and no evidence of sales associated with the asserted repair services (para 11, Requesting Party Written Argument);
- Mr. Wiebe provides no evidence explaining the connection between the Owner, the Mark and the associated goods. The cover letter attaching Mr. Wiebe’s declaration is addressed from “Red Line Sports Accessories Ltd.” while the Mark is registered to Mr. Wiebe, an individual (para 12, Requesting Party Written Argument);
- The Wiebe declaration provides no evidence explaining the connection between the Owner, the Mark and the Services (para 13, Requesting Party Written Argument);
- There is no evidence that would permit a conclusion that the Mark was used during the Relevant Period in Canada by the Owner or its licensee (paras 14, 19 & 25, Requesting Party Written Argument);
- If any use of the Mark has been shown, such use has not inured to the benefit of the Owner who has not shown that he directly or indirectly controls the character and quality of the associated goods and services (para 61, Requesting Party Written Argument); and
- There is no evidence of special circumstances which would excuse non-use (para 62, Requesting Party Written Argument).

[15] In a section 45 proceeding, the burden of proof is on the registered owner of the trademark to demonstrate “use” in order to maintain the registration of the mark. While it is clear from the jurisprudence that this burden is not a stringent one, the owner must establish a *prima facie* case of use during the Relevant Period within the meaning of section 4 of the Act [*Brouillete Kosie Prince v Orange Cove-Sanger Citrus Association*, 2007 FC 1229].

[16] The Requesting Party’s objections to the evidence are set out in para 14 above. The objections made relate to substantive deficiencies as opposed to technical deficiencies.

[17] I agree that there are deficiencies in the Owner's evidence that are not merely technical in nature and I conclude that the Owner has failed to show use of the Mark in Canada in association with the registered Goods and Services during the Relevant Period.

[18] All five paragraphs of Mr. Wiebe's declaration are in the present tense and therefore his assertions speak to the date on which the declaration was made and not to what use of the Mark may have taken place during the Relevant Period. As a result, there is no evidence before me upon which I can conclude that there was use of the Mark in Canada during the Relevant Period in association with any of the registered Goods or Services. I am therefore not satisfied that the evidence demonstrates use of the Mark by the Owner in Canada in association with any of the registered Goods or Services.

[19] Further, there is no evidence of any special circumstances excusing the absence of use of the Mark during the Relevant Period.

DISPOSITION

[20] In view of the above, pursuant to the authority delegated to me under section 63(3) of the Act and in compliance with the provisions of section 45 of the Act, the registration will be expunged.

Jane Steinberg
Member
Trademarks Opposition Board
Canadian Intellectual Property Office

**TRADEMARKS OPPOSITION BOARD
CANADIAN INTELLECTUAL PROPERTY OFFICE
APPEARANCES AND AGENTS OF RECORD**

HEARING DATE No Hearing Held

AGENTS OF RECORD

No Agent Appointed

For the Registered Owner

Norton Rose Fulbright Canada LLP

For the Requesting Party